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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ERIKA BRENNER, Plaintiff and Respondent, v. GLENN JOHNSON LAW, LLP et al., Defendants and Appellants.	G046532 (Super. Ct. No. 30-2011-00511480) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Motion to strike. Order affirmed. Motion denied.

Klatte, Budensiek & Young-Agriesti, E.W. Klatte, III, Summer Young-Agriesti; Heikaus Weaver and Chris M. Heikaus Weaver for Defendants and Appellants.

Law Office of William B. Hanley, William B. Hanley; Law Office of Laura Sullivan and Laura M. Sullivan for Plaintiff and Respondent.

* * *

Defendants Glenn Johnson Law, LLP (the firm), and William Glenn Johnson (Johnson) appeal from the denial of their motion to compel arbitration of the complaint filed by plaintiff Erika Brenner for wrongful discharge in violation of public policy, fraudulent concealment, sexual discrimination in violation of California's Fair Employment and Housing Act (FEHA), and defamation. They contend the court erred in finding the arbitration provision in the partnership agreement between them and plaintiff was unconscionable and did not cover plaintiff's asserted claims. We conclude the provision is unconscionable and that defendants have not shown the court abused its discretion in not severing the unconscionable provisions. As such, we do not consider defendants' additional arguments.

Plaintiff's motion to strike the declaration of defense counsel and portions of the reply brief referring to matters outside the record is denied. Although she is correct the documents are outside the record, they are irrelevant to our decision and we ignore them rather than strike them. (Cal. Rules of Court, rule 8.204(e)(2)(C); *Connecticut Indemnity Co. v. Superior Court* (2000) 23 Cal.4th 807, 813, fn. 2; *Matuz v. Gerardin Corp*. (1989) 207 Cal.App.3d 203, 206-207.)

FACTS AND PROCEDURAL HISTORY

After plaintiff passed the bar in November 2009, Johnson, a partner at Spray Gould & Bowers, LLP (SGB) where plaintiff was working as a law clerk, solicited her to join a new firm he was creating. She agreed and began working for him in March 2010. Over nine-and-a-half months later they entered into a partnership agreement, giving plaintiff 5 percent and Johnson 95 percent interest in the firm.

A year after she started at the firm, plaintiff was fired. Plaintiff sued defendants, who in turn moved to compel arbitration based on the following provision in the partnership agreement: "11.10 **Disputed Matters**. Except as otherwise provided in

this Agreement, any controversy or dispute arising out of this Agreement or the interpretation of any of the provisions hereof, or the action or inaction of any Partner or Managing Partner hereunder, shall be submitted to arbitration."

In support of the motion, Johnson declared he and plaintiff drafted the agreement together using SGB's partnership agreement as a template. According to him, plaintiff's only concern upon reviewing the template was how much money she had to invest for her initial capital contribution. He attested plaintiff edited the agreement but not the arbitration provision, the benefits and enforceability of which they had discussed and which was included in the final draft of the agreement signed by the parties.

Plaintiff opposed the motion on various grounds, including that the arbitration clause was unconscionable. In her supporting declaration, plaintiff attested "it was never contemplated . . . [she] would be a 'real' partner of Johnson's, but rather his employee" and Johnson's "only purposes in forming a partnership were to reap the tax benefits to shield himself from liability." Plaintiff did not negotiate any terms; instead, "Johnson made all the decisions regarding structuring the new firm and gave all of the directions that [she] had to follow in order to be part of the new firm."

Johnson told her to prepare the partnership agreement using the template from SGB, and to change the name of the firm and "make only the edits . . . he directed." The only alterations she made were those ordered by Johnson and whenever she forwarded him a draft with edits, it was pursuant to his command. She made no changes to the arbitration provision because he did not instruct her to. She believed she "had to accept Johnson's terms" to maintain her employment When plaintiff asked if she could purchase more than the 5 percent interest designated in the final agreement, Johnson refused her request.

Plaintiff also denied discussing the benefits of arbitration with Johnson, declaring he "never treated [her] as a partner." Rather he alone made all decisions

regarding hiring and firing, accepting, rejecting, or settling cases, and "every other meaningful firm matter."

The court denied the motion, finding, among other things, the arbitration clause was unconscionable under *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*) based on plaintiff's declaration.

DISCUSSION

1. Applicable Law and Standard of Review

"Unconscionable arbitration agreements are not enforceable. [Citation.] To be voided on this ground, the agreement must be both procedurally and substantively unconscionable. [Citation.] '"[T]he former focus[es] on '"oppression"' or '"surprise"' due to unequal bargaining power, the latter on '"overly harsh"' or '"one-sided"' results." [Citation.]' [Citation.] But the two elements need not exist to the same degree. The more one is present, the less the other is required. [Citation.]" (*Wherry v. Award, Inc.* (2011) 192 Cal.App.4th 1242, 1246 (*Wherry*).)

We review a finding of unconscionability de novo where the declarations "'raise "no meaningful factual disputes[,]" . . . [but] where an unconscionability determination "is based upon the trial court's resolution of conflicts in the evidence, or on the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to the court's determination and review those aspects of the determination for substantial evidence." [Citation.]'" (*Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1144 (*Samaniego*).)

Here the court resolved the factual disputes between plaintiff's and Johnson's declarations to conclude "the 'partnership agreement' was in effect, an employment agreement[, the signing of which was a condition of plaintiff's employment,] due to the plaintiff's minimal interest and control over the 'partnership.'"

Johnson acknowledges as much by stating the agreement "is the functional equivalent of an employment agreement — it sets forth the terms and conditions that governed [plaintiff's] working relationship with [d]efendants . . . ."

The court's findings are also supported by substantial evidence. Plaintiff attested she had only a 5 percent interest in the partnership and when she "asked about purchasing a greater interest, . . . [she] was refused." She was allowed to make changes to the partnership agreement only as directed by Johnson. Because Johnson did not instruct her "to make any changes to the arbitration provision, . . . [she] left it alone." "No terms were negotiated but rather" Johnson made all the decisions about the firm and plaintiff had "no decision-making abilities." He "gave all of the directions that [she] had to follow in order to be part of the new firm."

The agreement confirms that Johnson, as the managing partner, had the sole authority to make decisions about the use of the firm's capital, workload, compensation, work hours and performance, and "such other conditions of employment as reasonably may be appropriate to the effective representation of the clients of the [p]artnership or to the profitability of the [p]artnership." Only Johnson had "the right to vote on any issue or matter concerning the [p]artnership," carry out determinations regarding the firm's general management, endorse checks and drafts for deposit into the partnership's accounts, and determine percentages to be paid to each partner.

2. Applicability and Continued Viability of Armendariz

Because substantial evidence supports the court's finding the agreement was one of employment, we reject defendants' contention *Armendariz* does not apply because the parties entered a partnership agreement.

Nor do we agree the United States Supreme Court in *AT&T Mobility LLC v. Concepcion* (2011) ___ U.S. ___, 131 S.Ct. 1740, 179 L.Ed.2d 742 overruled "[t]he *Armendariz* [u]nconscionability [a]nalysis [f]or [a]rbitration [a]greements." (Bold and

underlining omitted.) As explained by *Sarmaniego, Concepcion* held the FAA preempts state law prohibiting a consumer from waiving class action rights in an arbitration agreement but in doing so "explicitly reaffirmed that the FAA 'permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability" . . . .' [Citations.] In short, arbitration agreements remain subject, post-*Concepcion*, to the unconscionability analysis employed by the trial court in this case." (*Samaniego*, *supra*, 205 Cal.App.4th at p. 1150.) The same applies here.

3. Substantive Unconscionability

"'Substantive unconscionability addresses the fairness of the term in dispute. [It] "traditionally involves contract terms that are so one-sided as to 'shock the conscience,' or that impose harsh or oppressive terms." [Citation.]' [Citation.]" (*Wherry*, *supra*, 192 Cal.App.4th at p. 1248.) According to plaintiff, the arbitration provision was substantively unconscionable because it did not require the employer to bear the burden of costs unique to arbitration and subjected her to attorney fees and costs prohibited by FEHA. We agree.

When an employer imposes mandatory arbitration of claims that include FEHA as a condition of employment, it must bear all costs unique to arbitration. (*Armendariz, supra,* 24 Cal.4th at p. 113.) The agreement here, the signing of which the court found was a condition of plaintiff's employment, does not require the employer to bear arbitration-unique costs but rather requires the losing party to do so. Specifically, paragraph 11.21 provides: "In the event that any dispute between the Partnership and the Partners or among the Partners should result in litigation or arbitration, the prevailing party in such dispute shall be entitled to recover from the other party all reasonable fees, costs and expenses of enforcing any right of the prevailing party, including without limitation, reasonable attorney[] fees and expenses."

Defendants argue "an arbitration agreement's silence as to who bears the costs of arbitration does not render it substantively unconscionable" because *Armendariz* held "'[t]he absence of specific provisions on arbitration costs [is] not . . . grounds for denying the enforcement of an arbitration agreement.' [Citation.]" (*Armendariz, supra*, 24 Cal.4th at p. 113.) That may be but in *Armendariz* "there was no provision at all as to who would bear the costs, contrary to the terms here that expose plaintiff[] to the risk of paying costs" (*Wherry, supra*, 192 Cal.App.4th at p. 1249) by expressly entitling the prevailing party in any arbitration to recover all reasonable costs "without limitation."

Additionally, "[i]n a FEHA case, unless it would be unjust, a prevailing plaintiff should recover attorney fees, but a prevailing defendant is awarded fees only if the case was frivolous or filed in bad faith. [Citation.]" (*Wherry, supra*, 192 Cal.App.4th at p. 1249.) "[A]greements [in such actions] provid[ing] that the prevailing party is entitled to attorney fees, without any limitation for a frivolous action or one brought in bad faith . . . violates *Armendariz*. [Citation.]" (*Ibid.*) Paragraph 11.21 of the partnership agreement does not contain the necessary limitation.

Defendants maintain this is "a standard bilateral provision" favoring plaintiff as a minority partner because without it she would not be able to recover attorney fees under her non-FEHA causes of action. Even if so, it also opens plaintiff to the possibility of having to pay large sums of attorney fees without requiring the case to be frivolous or filed in bad faith in contravention of *Armendariz.*

In a footnote in their reply brief, defendants assert "an arbitrator may well refuse to enforce the attorney[] fees provision to the extent it conflicts with the standard under FEHA." But they cite to nothing in support. And contrary to their claim, the agreement specifically entitles the prevailing party "to recover . . . all reasonable fees[and] and costs . . . without limitation" in "any dispute." (See *Wherry, supra*, 192 Cal.App.4th at p. 1249 [rejecting similar claim where unsupported by agreement and arbitration manual allowed fees if provided for by agreement].)

4. Procedural Unconscionability

"Procedural unconscionability may be proven by showing oppression, which is present when a party has no meaningful opportunity to negotiate terms or the contract is presented [to them] on a take it or leave it basis. [Citations.]" (*Wherry, supra*, 192 Cal.App.4th at pp. 1246-1247.) The court found that to be the case here based on plaintiff's declaration. Among other things, plaintiff attested Johnson made all decisions about the new firm's structure and "[n]o terms were negotiated." Johnson also initiated and directed all changes in the partnership agreement, which she "had to accept . . . in order to be employed by the firm." These facts constitute substantial evidence to support the court's determination of procedural unconscionability.

Relying on *Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, defendants argue otherwise. The plaintiff there, an experienced attorney, sued for wrongful termination and the defendant employer sought to compel arbitration based on a provision in the employment offer. *Dotson* agreed with the trial court "procedural unconscionability is present [but] only because the offer was presented on a take-it-or leave-it basis," noting, inter alia, the plaintiff "is not an uneducated, low-wage employee without the ability to understand that he was agreeing to arbitration. He was the opposite—a highly educated attorney, who knowingly entered into a contract containing an arbitration provision in exchange for a generous compensation and benefits package." (*Id*. at pp. 981-982.)

Defendants contend plaintiff, also a highly-educated attorney, failed to show even a minimal degree of procedural unconscionability because she "was not presented with a take-it-or-leave-it agreement" or "a pre-printed form"; rather, she "actively negotiated" it and "prepared the first draft . . . herself," using the SGB partnership agreement as a template after discussing the benefit of potentially using the SGB arbitration provision to resolve disputes with SGB. But plaintiff attested otherwise and the court resolved the conflicts in the parties' declarations in her favor. Because we

review for substantial evidence, we disregard the contrary evidence presented by defendants. (*Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1285.)

Plaintiff argues the court's finding "is bolstered by the omission of the relevant arbitration rules from the [a]greement," which a number of courts have held supports a procedural unconscionability finding. (*Samaniego*, *supra*, 205 Cal.App.4th at p. 1146.) Defendants claim plaintiff, as an attorney and the one who drafted the agreement, was "completely capable of looking up the relevant rules any time she wished" and was the one "who failed to attach a copy of the rules." But plaintiff attested everything she did with respect to the agreement was at Johnson's direction or instruction; if he did not instruct her to do something she did not do it, including making changes to the arbitration provision, and, inferentially, attaching a copy of the rules. This adds to the court's determination of procedural unconscionability, which although perhaps minimal, suffices because of the high degree of substantive unconscionability.

5. Severance

Defendants maintain that even if the provision for fees and costs was unconscionable, the court could have severed it from the agreement, as it did "not even relate directly to arbitration[and] . . . can be excised from the [a]greement without affecting the arbitration provision in any way." A court's "'ruling on severance is reviewed for abuse of discretion.' [Citations.]" (*Samaniego*, *supra*, 205 Cal.App.4th at p. 1144.) But since defendants never asked the court to exercise its discretion to sever the provision, they "cannot now complain the court's decision was erroneous." (*Id*. at p. 1149 [finding credible the plaintiff's argument the defendant forfeited severance claim by not asking for it].)

Moreover, an arbitration provision containing "'more than one unlawful provision'" may be "'considered permeated by unconsionability'" such that the court may refuse to enforce it. (*Samaniego*, *supra*, 205 Cal.App.4th at p. 1149.) "'[M]ultiple

defects [in an agreement] indicate a systematic effort to impose arbitration on [a weaker party] . . . [not simply as an alternative to litigation, but] as an inferior forum that works to [the stronger party's] advantage.' [Citation.]" (*Wherry*, *supra*, 192 Cal.App.4th at p. 1250.) The agreement here not only failed to require defendants, plaintiff's employer as found by the court, to bear all costs unique to arbitration but it also contained an unlawful fees provision, making it "'so "'permeated' by unconscionability [it] could only be saved, if at all, by a reformation beyond our authority." [Citations.]' [Citation.]" (*Ibid.*)

DISPOSITION

The order is affirmed. Respondent's motion to strike counsel's declaration and documents attached to the reply brief is denied. Respondent shall recover costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.